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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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MAR 10 1998

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Petition for Forbearance of)	DA 98-111
the Cellular Telecommunications)	
Industry Association)	

REPLY COMMENTS OF BELL ATLANTIC MOBILE, INC.

The comments submitted in response to CTIA's Petition for Forbearance make clear that all of the standards of forbearance are met. Even a quick reading of the comments shows that forbearance from forcing CMRS providers to deploy wireless number portability is not needed to protect against unlawful carrier practices or to protect consumers. There are no facts in the record that show how the rules could provide these protections, let alone that they are "necessary" for this purpose, as Section 10 of the Communications Act requires in order to deny a petition to forbear. Moreover, the record shows not only that forbearance will serve the public interest, but that it is the number portability rules themselves that will impair competition and raise prices to consumers.

The record exposes an equally serious legal flaw in the Commission's continued enforcement of wireless number portability: the very premises on which the wireless number portability rules were based have proved wrong. Courts have repeatedly instructed agencies that, when the rationale for their original decision

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proves incorrect or is overtaken by developments, agencies cannot blindly continue to enforce the rules. This is particularly true where, as here, rules are based not on facts but on predictions as to potential future benefits. When those predictions are, as here, not supported by real-world experience, the agency cannot lawfully continue enforcement. That is the situation here, because the central premises of the Commission's 1996 decision -- that new CMRS entrants wanted wireless number portability and that it would increase competition -- have proven to be wrong. Forbearance is thus not merely required under Section 10; it is independently required by fundamental principles of administrative law.

The Commission's decision to impose wireless number portability requirements on broadband CMRS providers relied almost entirely on a prediction that the rules would stimulate competition in the wireless industry by enabling new entrants to attract customers. The Commission had no facts to support this bald prediction. For example, there were no customer surveys and no market studies showing that wireless subscribers were discouraged from changing wireless providers by the lack of number portability or that they valued their wireless phone number. (To the contrary, evidence indicated that most subscribers did not even know their wireless number.) Instead of relying on facts, the Commission relied on a handful of comments which claimed that wireless number portability would promote their ability to compete with existing CMRS providers.¹

¹Bell Atlantic Mobile sought judicial review of the Commission's decision because, among other failings, the decision lacked the requisite record basis to adopt wireless number portability rules, and that appeal remains pending. Bell

For multiple reasons, the responses to CTIA's Petition confirm that the Commission's original assumptions have proven incorrect.

1. The Commission based its 1996 decision on the belief that wireless number portability would promote competition. But that belief has proven unfounded. The decision, based on comments dating back to 1995, was stale before it was made because it failed to take into account the rapid growth and new entry into wireless services that was already occurring. Information submitted in response to CTIA's Petition and the Commission's own findings show that wireless competition has continued to grow rapidly.² There is no evidence that the absence of wireless number portability has impeded these pro-competitive developments in any way. No commenter presented any facts showing why wireless number portability would enhance competition either between wireless providers or between wireless and landline providers. The assumed nexus between wireless portability and competition simply does not exist.

Atlantic NYNEX Mobile et al. v. FCC, No. 97-9551 (10th Cir.). But regardless of whether or not the Commission had a legally sufficient basis for its 1996 decision at that time (which BAM submits it did not), the Commission has no lawful basis to enforce the rules now.

²E.g., Comments of AirTouch Communications at 5-6; BAM at 10-13; PrimeCo Personal Communications L.P. at 7-10; Southwestern Bell Mobile Systems/Pacific Bell Mobile Services at 3-6. The Commission has pointed to declining wireless prices and rapid new entry in touting the success of wireless competition. E.g., Remarks by Chairman William Kennard to the National Association of State Utility Consumer Advocates, February 9, 1998; Remarks of Commissioner Susan Ness to the Economic Strategy Conference, March 3, 1998. These pronouncements on wireless competition cannot be squared with wireless number portability, which is ostensibly intended to achieve, at great cost, competition that already exists.

2. The Commission's 1996 decision did not address concerns that wireless portability would impose unacceptable costs that would raise prices and deter competition. But the record now establishes the damaging and anti-competitive impact of forcing CMRS providers to deploy wireless number portability. New CMRS entrants -- the same parties the Commission thought would be aided by wireless number portability -- argue that, based on their own actual experience in the market, wireless number portability will not only fail to help them compete, but will actually impair competition and will particularly burden small carriers.³ The reason is plain: if new entrants have to make the huge investment in wireless number portability, they have far less to devote to system buildout, advertising and other efforts, or must raise prices to cover these additional costs. Again, the premises for the rules have been undermined by real world experience.⁴

3. The 1996 decision, because it lacked any facts on competitive benefits of wireless number portability, heavily relied on the comments of a few parties who advocated wireless number portability. But some of those parties now oppose the very rules they had supported at the time, and instead request forbearance.

³E.g., Comments of Rural Telecommunications Group at 3 (failure to forbear "would delay, and possibly halt, the progress these entities are making in the delivery of new services to rural areas"); PrimeCo at 15 (failure to forbear "will hinder new PCS entrants' ability to expand coverage to compete with incumbent cellular providers").

⁴Even were the Commission not persuaded that wireless number portability is actually impairing competition, there can be no doubt that the record is barren of any facts showing that portability is needed to promote competition. The absence of any established benefit from the rule at issue, given the rule's well-documented burdens and costs, alone establishes that forbearance is required.

CMRS entrants whom the Commission predicted its rules would help no longer want that "help." In this way as well, the premise that the rules would give certain CMRS new entrants what they wanted, regardless of being a legally invalid rationale at the time, has now been undermined.

The Commission's 1996 decision specifically relied on the comments of PrimeCo, a new PCS entrant, which had advocated wireless number portability.⁵ PrimeCo now, however, opposes the rules:

PrimeCo initially thought, when the Commission initiated the instant proceeding in mid-1995, that wireless number portability ("WNP") might help promote competition between new wireless entrants. The wireless market has evolved considerably since then, however, and PrimeCo's assumptions concerning the value of WNP have proven erroneous. . . . The Commission's original public interest justifications for WNP are largely irrelevant.⁶

PCIA and Pacific Bell, which the Commission had also relied on in basing the rules on PCS industry support, now support forbearance as in the public interest. Both express the concern that deploying wireless number portability will impede rather than help PCS providers' ability to compete. Other new CMRS entrants, the very parties the Commission declared it was adopting the rule to assist, also support forbearance.⁷

⁵Telephone Number Portability, 11 FCC Rcd 8352 (1996) at ¶ 161.

⁶Comments of PrimeCo at i-ii.

⁷E.g., Comments of AMTA at 2 (representing SMR providers); Sprint Spectrum L.P. at 3 (forbearance warranted because requiring wireless number portability "impedes buildout, aggressive marketing and price competition"); Rural Telecommunications Group at 7 (noting harms of enforcing rules against smaller and rural CMRS providers); GTE Service Corp. at 5-7 (number portability will not help GTE's PCS systems to attract customers but will impair competition).

4. The 1996 decision also speculated that imposing wireless number portability would enable CMRS providers to compete in the landline market (although it failed to explain how this would or could occur). But CMRS providers commenting on CTIA's Petition state that, based on their own actual experiences, the requirement will in fact impede their ability to compete in the landline market and increase their costs, making it even harder to compete on price with landline carriers.⁸ BAM does not disagree with the Commission's goal of promoting CMRS competition with local exchange carriers. But BAM vehemently disagrees that forcing CMRS carriers to pay for the expensive and complex network changes needed to deploy wireless number portability will encourage such competition. The record here confirms that saddling CMRS providers with these costs will have precisely the opposite effect, by undercutting efforts to bring CMRS pricing in line with LEC pricing. Far from promoting wireless-landline competition, wireless number portability will if anything hinder it.

Given this record, forbearance, if not outright repeal of the rules, is legally required. The federal courts have repeatedly held that an agency cannot blindly continue to enforce regulations where the original rationale for those rules is no longer valid or has been overtaken by events and new facts. Rules cannot be enforced where they had been adopted based on factual assumptions which later prove incorrect or where later developments undermine them. This is precisely the case with wireless number portability.

⁸Comments of AirTouch at 6; GTE Service Corp. at 5-7; PrimeCo at 8.

In Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979), for example, the D. C. Circuit reversed the Commission for maintaining certain cable television rules after the factual premise for the rules had disappeared. The Commission had adopted the rules based on the belief that they would serve the public interest because they "would facilitate the passage of new copyright legislation and the realization of the benefits anticipated therefrom." 610 F.2d at 975. The rules were challenged as having lost their initial public interest rationale because, among other developments, legislation had been enacted. The court agreed. It held that the public interest basis which may have initially justified the rules was no longer valid:

What we have, then, are cable television rules that may or may not presently square with the public interest. Even assuming that the rules in question initially were justified . . . it is plain that that justification has long since evaporated. . . . Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears.

610 F.2d at 980. The wireless number portability rules were based on the prediction that they would assist competition and on the fact that some new entrants sought the rules. Both of these premises, like the predicate for the Commission's rules in Geller, are no longer valid. Geller compels forbearance.⁹

⁹See also Meredith v. FCC, 809 F.2d 863, 873 (D.C. Cir. 1987), where the court reversed an FCC order that a licensee had violated the Commission's political broadcasting rules, because the Commission's findings in a subsequent proceeding "largely undermined the legitimacy of its own rule" and "eviscerates the rationale for its existing regulations." Here, too, subsequent facts undermine the rationale for enforcing wireless number portability.

In Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992), the Court invalidated an FCC policy for awarding new broadcast station licenses for the same reason: it found that the original rationale for the policy was no longer accurate. The case involved the Commission's "integration" policy for awarding comparative credit to applicants for new stations. Integration was based on findings that it would be in the public interest because it would encourage local ownership of stations. But the Commission subsequently permitted ownership structures that allowed integration credit even when the owners were not local residents. Ms. Bechtel, just like CTIA now, argued that the FCC's approach "no longer served its stated objectives," and that "the reality of the current regulatory environment is at odds with whatever policy originally supported" the approach. 957 F.2d at 979-81. The court agreed:

While the Commission is correct that changes of policy require rational explanation, it is also true that changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach "if a significant factual predicate of a prior decision . . . has been removed." . . . The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise . . . implies a correlative duty to evaluate its policies over time to ascertain whether they work -- that is, whether they actually produce the benefits the Commission originally predicated they would.

957 F.2d at 881 (citations omitted, emphasis added). Here, too, the record on CTIA's Petition fails to establish that the wireless number portability rules would "actually produce the benefits" that were predicted. To the contrary, it shows that the rules are impairing the very goals on which they were premised. Bechtel, like

Geller, compels forbearance.¹⁰

In sum, the assumptions and premises underlying the wireless number portability rules do not square with reality of competitive forces in the CMRS market today, and the rules are opposed by many of the very parties they were expressly intended to assist. Forbearance should be granted forthwith.

Respectfully submitted,

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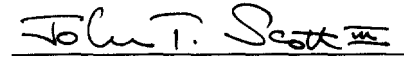
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¹⁰This principle has been applied to invalidate actions of other agencies. For example, in American Horse Protection Ass'n v. Lyng, 812 F.2d 1 (D.C. Cir. 1987), the Department of Agriculture adopted regulations in 1982 which were intended to protect the health of horses. Subsequent medical studies showed that the factual premise for the rules had proved incorrect. The court noted that there was an "apparent inconsistency" between the basis for the rules and the results of the medical studies, and that the agency's rationale in 1982 "was by 1984 too stale to justify continued inaction." The court applied Geller and found the agency's failure to act unlawful given developments that undermined the rules' basis.

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of March, 1998, caused a copy of the foregoing "Reply Comments of Bell Atlantic Mobile, Inc." to be sent by first-class mail, postage prepaid, to the following:

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